**STATE OF ILLINOIS**

**ILLINOIS COMMERCE COMMISSION**

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| **COMMONWEALTH EDISON COMPANY** | : | |
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| **Petition to implement a competitive procurement process by establishing Rider CPP, Rider PPO-MVM, Rider TS-CPP and revising Rider PPO-MI** | : : : : : : : | **Docket No. 05-0159** |

**BRIEF ON EXCEPTIONS**

**OF**

**THE BUILDING OWNERS AND MANAGERS ASSOCIATION OF CHICAGO**


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DATE: December 19, 2005

**ORAL ARGUMENT REQUESTED**

**STATE OF ILLINOIS**
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# BRIEF ON EXCEPTIONS
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# THE BUILDING OWNERS AND MANAGERS ASSOCIATION OF CHICAGO

Now comes the BUILDING OWNERS AND MANAGERS ASSOCIATION OF CHICAGO, by its attorneys GIORDANO & NEILAN, LTD., and hereby files its Brief on Exceptions in this proceeding pursuant to Section 200.830 of the Rules of Practice of the Illinois Commerce Commission (the "Commission" or "ICC").

## INTRODUCTION AND SUMMARY OF POSITIONS

The Building Owners and Managers Association of Chicago ("BOMA") serves the interests of the commercial office building industry in Chicago and is the nation's oldest local commercial office building organization. Members of BOMA own and/or manage more than 270 office buildings, comprising more than 168 million square feet of office space in the service territory of Commonwealth Edison Company ("ComEd").

BOMA intervened and has participated actively in this proceeding because its members are directly affected by this matter.

ComEd filed proposed tariffs on February 25, 2005, seeking authority from the Commission to utilize a competitive auction procurement process to acquire ComEd's full requirements for electricity supply post-2006. On December 5, 2005, the Administrative Law Judge issued a proposed order ("the Proposed Order") in this case. The Proposed Order is the subject of this Brief on Exceptions and accompanying Exceptions being filed concurrently by BOMA which set forth the specific language changes BOMA is requesting in the Commission's Final Order in this case.

BOMA appreciates the Administrative Law Judge's efforts to lessen somewhat the massive rate shock projected for nonresidential electric space heating customers by adopting BOMA's proposal to apply Commission Staff's rate mitigation plan to this specific group of customers. Therefore, BOMA supports the Proposed Order's Commission Conclusion regarding nonresidential space heating customers. BOMA also supports the Proposed Order's Commission Conclusion providing for an annual Commission review of the prudency of ComEd's charges to consumers for electricity supply determined by an auction procurement process. However, BOMA takes exception to the Proposed Order's approval of the specific auction procurement process proposed by ComEd. Additionally, as fully discussed below, BOMA contests the Proposed Order's approval of ComEd's proposed Power Purchase Option ("PPO") tariff, on grounds it violates Section 16-112(a) of the Public Utilities Act, and requests other changes which will result in less volatility in ComEd's charges to consumers.

ComEd's proposed competitive procurement auction uses a descending clock, uniform price approach, meaning that ComEd would pay all winning suppliers the same uniform, "market clearing" price. Under ComEd's auction proposal, bidders would first be asked to supply power at a relatively high price at which an oversupply of power would be expected to be bid. The auction price would then "tick down" until the amount of supply offered no longer exceeded ComEd's full electricity supply requirements. At that point, the auction would be stopped and all remaining bidders would be paid the uniform, "market clearing" price at which the auction was ended. Under ComEd's proposal, as of January 1, 2007, all charges to consumers would be based on ComEd's costs of electricity supply resulting from the auction in addition to ComEd's charges for delivery of electricity. ComEd has separately requested a substantial increase in its delivery charges which is currently pending before the Commission in Docket No. 05-0597.

The uniform, "market clearing" price auction format proposed by ComEd violates the Public Utilities Act (the "Act") because it is not the least-cost method of electricity supply procurement. Moreover, ComEd's proposed pass-through to consumers of supply costs established by its uniform price approach auction violates the Act's requirement that ComEd's rates be just and reasonable.

In order to remedy these problems, internationally renowned economist Dr. Arthur B. Laffer recommended on BOMA's behalf that ComEd's proposed auction be modified from a descending clock, uniform price auction to a descending clock, pay as bid method. Under Dr. Laffer's descending clock, pay as bid proposal the auction would not stop when it reaches a "market clearing" price and bidders would not be informed when the amount of supply being bid equaled ComEd's electricity supply requirements. Moreover, in contrast to ComEd's approach, bidders also would not be provided with any information on excess supply being bid during the auction in order to prevent implicit collusion among bidders on when they should stop bidding. As a result of these changes, bidders would need to continue to bid until they were no longer satisfied with their profit margins to insure that they would be successful in the auction.

As Dr. Laffer fully explained in both written and oral testimony, his pay as bid approach will in all likelihood result in a lower cost of supply for ComEd and therefore lower charges for consumers than ComEd's uniform price approach. Pay as bid auctions have previously been used successfully on numerous occasions. For example, pay as bid auctions have been used by electric utilities in the United Kingdom ("U.K.") and by the Federal Communications Commission to sell Personal Communications Services ("PCS") licenses for particular slices of the radio spectrum. In fact, U.K. electric utilities were forced to switch from a uniform price auction to pay as bid by U.K.'s utility regulatory agency after the agency found that the uniform price method was unnecessarily inflating electricity prices. During the first year after the change from uniform pricing to pay as bid, annual electricity baseload prices went down 20% and peaking power prices were reduced 27%.

As Dr. Laffer also pointed out in his testimony, ComEd's uniform price approach not only will harm consumers but also will unfairly benefit ComEd's affiliate, Exelon Generation, which will be a bidder in ComEd's auction. Therefore, BOMA urges the Commission to modify the Proposed Order so that the Commission's Final Order incorporates Dr. Laffer's proposed descending clock, pay as bid approach rather than

ComEd's proposed descending clock, uniform price method. If the Commission adopts Dr. Laffer's pay as bid approach, ComEd will implement it according to the unequivocal testimony of ComEd witness Frank Clark in this proceeding.[1] (ComEd Tr., pg. 140, ln. 19 to pg. 141, ln. 6). Moreover, ComEd's auction designer Dr. Chantale LaCasse testified that she would be willing to serve as the auction manager if Dr. Laffer's approach is adopted. (Joint Tr., pg. 902, ln. 19 to pg. 603, ln. 1).

**EXCEPTION 1: The Proposed Order's Conclusion Adopting ComEd's Descending Clock Uniform Price Auction Is Erroneous Because The Record Showed That Dr. Laffer's Descending Clock, Pay As Bid Approach Will In All Likelihood Result In Lower Electricity Prices And Is Feasible To Implement**

The Proposed Order states that "the pay as bid approach has appeal based on the claim of lower prices." (Proposed Order, pg. 100). Nevertheless, the Proposed Order concludes that the pay as bid auction approach "is too untried to be usable in Illinois." (Proposed Order, pg. 100). Contrary to the Proposed Order's conclusion, the record in this proceeding shows that the pay as bid approach is a superior design which has been previously used successfully to obtain the lowest possible prices for electricity and other products.

**A. Dr. Laffer's Pay As Bid Auction Method Would In All Likelihood Result In The Lowest Possible Prices Because Each Accepted Bid Would Be At The Lowest Price At Which The Bidder Was Willing To Sell Electricity To ComEd**

Dr. Laffer succinctly summarized the fundamental flaw in ComEd's proposed uniform price auction in his rebuttal testimony: "Why on earth would anyone ever prohibit a supplier from offering a lower price?" (BOMA Ex. 3.0, pg. 4, ll. 83-84). Dr.

[1] At the time of his testimony Mr. Clark was President of ComEd and Executive Vice President and Chief of Staff of Exelon Corp. (ComEd Tr., pg. 71, ll. 5-10). On information and belief, Mr. Clark is now Chairman and Chief Executive Officer of ComEd.

Laffer testified that the ComEd approach violates basic economics because it does not utilize the entire supply curve. (BOMA Ex. 1.0, pp. 12-13, ll. 279-287; BOMA Ex. 3.0, pg. 12, ll. 279-283). Dr. Laffer elaborated on this point in response to a question posed by the Administrative Law Judge ("ALJ"):

> Q All right. In light of that, why do you still insist that your method is better? Simply because of the potential for collusion?
>
> A Well, that's one of the things there, but it's general economics, sir. This is a general economic situation whereby I do not understand how you can make it better for the people of Illinois not to allow a supplier to offer a lower price.
>
> Why you would say you cannot go below this price makes no sense whatsoever to me or basic economic textbooks. You should always allow them to bid lower if they want to.

(ComEd Tr., pg. 412, ln. 18 to pg. 413, ln. 7).

Dr. Laffer also testified that ComEd's prohibition on suppliers bidding lower in a descending clock auction makes sense only in the context of ComEd's affiliate relationship with electricity supplier Exelon Generation, which owns more than 10,000 MW of nuclear generating capacity located in ComEd's service territory. (ComEd Tr., pg. 398, ll. 6-12; CUB-CCSAO Ex. 1.2). Dr. Laffer also discussed this issue further in another discourse with the ALJ:

> Q ComEd disagrees that they are monopsonist. Easy for you to say.
>
> A I don't know if they disagree with that or not, but ComEd is the single buyer in this specific market. And that's what sort of monopsonist means.
>
> The strange thing about ComEd in this market is they also are a sister corporation of one [of] the generators who's supplying this market and in the auction selling to ComEd.
>
> Exelon Generation and ComEd, of course, are owned by Exelon Corporation together. So it would be very surprising to me if

> ComEd did not have an interest in seeing Exelon Generation do well because it would help the other company.

(ComEd Tr., pg. 411, ln. 17 to pg. 412, ln. 8).

Dr. Laffer first pointed out ComEd's serious conflict of interest due to its affiliation with Exelon Generation in his direct testimony. (BOMA Ex. 1.0, pp. 15-16, ll. 340-368). Although ComEd's prohibition on bidders bidding lower helps Exelon Generation, it is diametrically opposed to the interests of ComEd's consumers. ComEd's conflict of interest will motivate ComEd to oppose any electricity supply procurement process that results in lower payments to electricity suppliers because such a process conflicts with the interests of Exelon Corp.'s subsidiary Exelon Generation.

Perhaps most importantly, Dr. Laffer's proposal not only will provide bidders the opportunity but also the incentive to bid lower than under ComEd's proposed uniform price approach, as Dr. Laffer explained in response to further questions by the ALJ:

> Q Okay. And if you come down from 30 to 29, how do [you] lose volume?
>
> A If they bid at 29, that's fine. But let's say they withdraw their bid. Let's say at 30 they say, We're not going to bid any more, and it comes down to 29 and the auction filled and they've lost the market.
>
> And they then aren't supplying to that market at 29 because they made a mistake and thought the market was cleared at 30. They don't know what the market clearing price is unless someone tells them.
>
> And if no one tells them, they will continue to bid the price that they think is still profitable for them.
>
> Q So if their costs are 25, they will keep going down?
>
> A Yeah. They'll keep going down until they balance off the risk and the return of going further, of course.

Q	Because they want the –

A	They want the market. That's exactly right. I mean, that's what you do in any type of negotiation.

When you build a rec room in your house, you go to people and ask them to bid and you use the pay-as-bid approach. You don't market clear at the highest person who says he'll build your rec room.

Q	Unless it's your brother-in-law.

A	Couldn't have said it better, exactly.

(ComEd Tr., pg. 414, ln. 14 to pg. 415, ln. 21).

Of course, ComEd could not rebut the conflict issue. Instead, ComEd contended through its witnesses that its uniform, "market clearing" price approach might result in a lower supply price than Dr. Laffer's pay as bid method. (ComEd Ex. 11.0 Rev., pg. 68, ll. 1592-1605; ComEd Ex. 12.0, pg. 41, ll. 873-874; pg. 43, ll. 903-922). ComEd witness Dr. LaCasse testified this was possible because bidders have the incentive to bid low prices in a "market clearing" price auction since all bidders know they will receive the "market clearing" price regardless of how low they bid. (ComEd Ex. 11.0, pg. 68, ll. 1595-1600; Joint Tr., pg. 897, ln. 19 to pg. 898, ln. 2). Although this theory could apply to uniform, "market clearing" price auctions that do not use a descending clock structure, Dr. Laffer pointed out that this approach does not apply here because bidders will never have a chance to bid low under the descending clock structure which starts with a high price and clicks down. (ComEd. Rev. Ex. 11.0, pp. 67-68, ll. 1579-1605; BOMA Ex. 3.0, pg. 8, ll. 168-172; ComEd Tr., pg. 389, ll. 9-16; pg. 394, ll. 16-18).

In a descending clock structure, Dr. Laffer clearly is correct that bidders should be allowed to bid as low as they desire in an effort to be successful in the auction. If the auction is not stopped at a uniform, "market clearing" price as Dr. Laffer had recommended, bidders will make bids closer to their marginal costs of production in order to insure their success in the auction and thereby lower the charges for electricity supply paid by consumers to ComEd. (BOMA Ex. 1.0, pp.10-11, ll. 10-11, ll. 234-242; pp. 12-13, ll. 272-287; pg. 15, ll. 329-334).

The record in this proceeding established that two companies, Exelon Generation and Midwest Generation, control a vast majority of the electricity production capacity in ComEd's service territory. (CUB-CCSAO Ex 1.2). As the Commission Staff stated in its Final Staff Report to the Commission on the Post-2006 Initiative: "where concentration levels are high (particularly where one or two firms control a significant portion of production capacity), firms have the ability to exercise market power." (ComEd Ex. 1.2, pg. 9). As both Dr. Laffer and Commission Staff witness Dr. Salant testified, Dr. Laffer's pay as bid proposal could reduce the opportunity for bidders to exercise market power in the auction, (BOMA 1.0, pp. 16-17, ll. 369-377; ICC Staff Ex. Corr., pg. 75, ll. 1699-1700). This is another important reason to adopt Dr. Laffer's proposed pay as bid method rather than ComEd's proposed uniform price approach.

### B. Pay As Bid Auctions Have Been Used Successfully Elsewhere For Supply Of Electricity And Other Products

The record in this proceeding contains several examples of pay as bid auctions for electricity and other products that have been successfully conducted elsewhere. In fact, ComEd auction designer Dr. LaCasse testified that ComEd's proposed auction in this case and the descending clock auction now being used in New Jersey were patterned after the FCC's auction of PCS licenses for radio spectrum, which is a pay as bid auction. (ComEd Ex. 4.0, pp. 3-4, ll. 72-86; pg. 11, ll. 235-246). Interestingly, however, ComEd and the New Jersey utilities abandoned the pay as bid format used by the FCC. These utilities' decisions contrast dramatically with the recommendation of one of ComEd's witnesses in this proceeding, Andrew Parece, that a pay as bid approach be used by the electric utilities in Massachusetts because pay as bid pricing best accomplishes the goal of determining competitive supply prices. (ComEd Ex. 12.2, pg. 12; see also ComEd Tr., pg. 1197, ll. 13-18). After Mr. Parece's recommendation, a pay as bid competitive bidding approach was utilized in Massachusetts. (Western Mass. Elec. Co., Mass. Dept. Tel. & Energy, Case No. 97-120 (1998), Order, pg. 3 and Case No. 97-120-D, Order, pp. 9-10; these orders were attached to BOMA's Initial Brief as Attachment D).

Perhaps most significantly, wholesale electricity purchasers with the most experience using auctions to purchase electricity (i.e., utilities in England and Wales) used a uniform, "market clearing" price auction beginning in 1990 and then switched to a pay as bid auction in 2001. (BOMA Ex. 1.0, pg. 8, ll. 164-171; pg. 9, ll. 191-194). As Dr. Laffer testified, the regulatory agency overseeing the U.K. electricity market required that the pay as bid method replace the uniform price approach after the agency found that the uniform price auction facilitated the exercise of market power to maintain or increase electricity prices at the expense of consumers. (BOMA Ex. 1.0, pp. 8-9, ll. 172-188). During the first year of the pay as bid approach in England and Wales, annual prices for baseload electricity decreased by 20% and peaking power prices fell by 27%. (BOMA Ex. 1.0, pg. 9, ll. 191-205). The pay as bid auction format was subsequently implemented in electricity markets across the entire U.K. (BOMA Ex. 3.0, pg. 23, ll. 529-532).

In contrast to the pay as bid auction in the U.K., uniform price auctions in the United States have not resulted in low prices. Ohio and New Jersey are the two states which have conducted descending clock, uniform price auctions to date. In Ohio, the uniform price auction results were rejected because prices were too high. (ComEd Tr., pg. 516, ll. 2-21; Joint Tr., pg. 868, ln. 8 to pg. 869, ln. 13; Finding and Order, Ohio Public Utility Comm. Case No. 04-1371-EL-ATA, pg. 4, paragraph 8 (December 9, 2004); this Finding and Order was attached as Attachment E to BOMA's Initial Brief). In New Jersey, achievement of the lowest prices for consumers was not even one of the goals of the New Jersey auction, as ComEd (and New Jersey) auction designer Dr. LaCasse admitted on the record in this proceeding. (Joint Tr., pg. 871, ll. 7-18). Moreover, the record shows that prices increased 18.6% from 2004 to 2005 for electricity supply contracts granted through the uniform price auction process of New Jersey's largest utility, PSE&G. (ComEd Ex. 18.0, pg. 19, ll. 409-410).

For the reasons discussed above, the Commission should reject ComEd's descending clock, uniform clearing price approach and instead adopt Dr. Laffer's proposed descending clock, pay as bid method as ComEd's method of acquiring its full requirements for electricity supply beginning January 1, 2007. To accomplish this objective, BOMA respectfully requests that the Commission incorporate in its Final Order BOMA's proposed alternative language to the Proposed Order's Commission Conclusion to Section V.D. set forth on pages 1 to 3 of BOMA's Exceptions.

**EXCEPTION 2: The Proposed Order Errs With Respect To Its Conclusion Regarding The Method Of Determining The Decrements To Be Used To Reduce Auction Prices**

The Proposed Order concludes that the proposal by ComEd and Commission Staff to provide price decrement formulas in the auction manual in a way that precludes bidders from making inferences about excess supply toward the end of the auction is prudent and reasonable. (Proposed Order, pg. 89). Unfortunately, this proposal provides insufficient protection to consumers because auction prices should be reduced in equal amounts throughout the auction in order to avoid tipping off the bidders in any way regarding the amount of supply being bid by others at any time during the auction. (BOMA Ex. 3.0, pg. 6, ll; 131-136).

Dr. Laffer's testimony showed that there not only is no reason to provide any information to bidders which can be used to determine the amount of excess supply, but also that bidders will use this information to implicitly collude on a high auction price. (BOMA Ex. 3.0, pg. 6, ll. 133-136). Moreover, if bidders are first provided information from which they can determine excess supply and later are denied this information, bidders will know that quantities being bid are getting close to ComEd's full requirements. (BOMA Ex. 1.0, pg. 15, ll. 335-339). Therefore, this approach has the same effect as continuing to give bidders this information. (BOMA Ex. 1.0, pg. 15, ll. 335-339). Consequently, the Commission should reject the Proposed Order's conclusion regarding price decrements and require that auction prices be reduced in equal amounts throughout the auction in order to avoid signaling the bidders in any fashion.

Based on the foregoing discussion, BOMA respectfully requests that the Commission adopt BOMA's proposed alternative language for the Commission Conclusion to Section V.C.4. set forth on page 4 of BOMA's Exceptions.

**EXCEPTION 3: The Proposed Order Errs In Not Concluding That ComEd's Proposed PPO-MVM Violates 16-112(a) Of The Public Utilities Act And Not Ordering ComEd To Continue To Offer Its Existing PPO-MI Or Alternatively A PPO-NFF To Comply With The Act**

ComEd claims and the Proposed Order concludes that ComEd's proposed Rider PPO – MVM ("PPO-MVM") implements ComEd's statutorily required PPO tariff in the manner required by Section 16-112(a) of the Act. (ComEd Supplemental Statement, pg. 4; ComEd Ex. 17.0, pg. 30, ll. 675-678; Proposed Order, pp. 216-217). ComEd's proposed PPO-MVM uses the electricity supply price determined by the auction process as the PPO tariff's market value. (ComEd Ex. 7.0, pg. 20, ll. 448-451). Section 16-112(a) provides, in relevant part, as follows:

> § 16-112. Determination of market value.
>
> (a) The market value … shall be determined … as a function of **an exchange traded or other market traded index, options or futures contract or contracts** applicable to the market in which the utility sells, and the customers in its service area buy, electric power and energy…

(220 ILCS 5/16-112(a)) (Emphasis added).

As the emphasized language in the quoted portion of the statute shows, the term "exchange traded or other market traded" modifies the terms "index, options or futures contract or contracts." Nevertheless, the Proposed Order concludes that ComEd's proposed PPO-MVM complies with Section 16-112(a) on the grounds that "exchange traded or other market traded" does not modify "futures contract or contracts." (Proposed Order, pp. 217).

In order to hold that a PPO tariff meets the market value determination requirements of Section 16-112(a), the Commission must find that the market value is determined as a function of an "exchange traded or other market traded index, options or futures contract or contracts," as expressly required by Section 16-112(a) of the Act. (220 ILCS 5/16-112(a)). ComEd's proposed Rider PPO-MVM does not determine its market value in a manner which meets this requirement because the Supplier Forward Contracts resulting from the auction are not exchange traded or other market traded futures contracts. (BOMA Ex. 1.0, pg. 19, ll. 426-442). Therefore, the Commission should find that ComEd's proposed Rider PPO-MVM does not comply with Section 16-112(a) and order ComEd to continue to offer its current Rider PPO-MI or alternatively a PPO determined by a neutral fact finder ("PPO-NFF") in order to comply with the Act post-2006.

Accordingly, BOMA respectfully requests that the Commission approve BOMA's proposed alternative language for the Proposed Order's Commission Conclusion to Section VII.B.3. set forth on pages 4 to 7 of BOMA's Exceptions.

**EXCEPTION 4: The Proposed Order's Conclusion That The 1 - 3 MW Customer Class Should Be Offered The CPP-A Auction Product Rather Than The CPP-B Auction Product Is In Error**

BOMA proposed that ComEd's CPP-B auction product be made available to customers with peak electricity demands of 1-3 megawatts ("MW") if an auction procurement process is approved by the Commission. (BOMA Corr. Ex. 2.0, pg. 6, ln. 130-135; BOMA In. Br., pp. 17-19). The Proposed Order, however, concludes that ComEd has shown that the 1-3 MW customer class should be provided service under the CPP-A product and that BOMA has not presented sufficient evidence to show why this customer class should instead be offered the CPP-B auction product. (Proposed Order, pg. 118). These conclusions are not supported by the record. The only testimony ComEd has presented in support of its proposal to offer the CPP-A auction product to the 1-3 MW customer group has been aptly rebutted by BOMA. (BOMA Corr. Ex. 2.0, pg. 6, ll. 130-135; pp. 23-24, ll. 487-513; BOMA Corr. Ex. 4.0, pp. 17-18, ll. 367-389). Moreover, BOMA has provided more than sufficient evidence to support its proposal that the 1-3 MW customer group be offered the CPP-B auction product. (BOMA Corr. Ex. 2.0, pg. 6, ll. 130-135; pp. 23-24, ll. 487-513; BOMA Corr. Ex. 4.0, pp. 17-18, ll. 367-389).

The 1-, 3- and 5-year contracts that comprise ComEd's CPP-B auction product will be staggered so that after the first year of the auction only 40% of ComEd's electricity supply requirements will be procured each year. (ComEd Ex. 3.0, pg. 24, ll. 525-529). ComEd based its proposal to deny the 1-3 MW customer class the CPP-B auction product and instead offer this class the CPP-A product, for which only one year contracts will be utilized, on ComEd's belief that 1-3 MW consumers "have more sophisticated energy planning options available to them, are better able to accept and manage risk, and will have different needs in the post-2006 environment than smaller customers." (ComEd Ex. 3.0, pg. 23, ll. 509-511) Additionally, ComEd witness Mr. McNeil argued in his rebuttal testimony that "providing these customers with such price protection [i.e., the CPP-B auction product] may discourage them from seeking out competitive retail suppliers, thereby retarding development of the competitive retail markets." (ComEd Ex. 10.0 Corr., pg. 52, ll. 1124-1126). These ComEd arguments do not support the exclusion of the 1-3 MW customer class from the CPP-B auction product.

Merely because the 1-3 MW consumers may be more sophisticated than other consumers does not mean that they should not continue to be offered ComEd rates that mitigate price volatility to the extent possible. This class of customers, like ComEd's classes of smaller customers, has not been declared competitive. There simply is no reason to treat the 1-3 MW class of customers differently than ComEd's classes of smaller customers unless and until this class of customers is declared competitive.

Although BOMA agrees that the staggered contract terms of the CPP-B auction product will somewhat lessen price volatility, ComEd's characterization of the CPP-B auction product as "price protection" that could somehow retard the development of the competitive retail markets is totally inaccurate. While the CPP-B auction product price will be less volatile than the price of ComEd's proposed CPP-A auction product, the CPP-B price will still be a far cry from ComEd's currently frozen bundled rates. As BOMA witnesses Messrs. Brookover and Childress stated in their rebuttal testimony:

> It is important to understand that the CPP-B rate does not, by any stretch of the imagination, constitute "price protection." Therefore, it is not our belief that the CPP-B rate would retard competition for the 1-3 MW customer class. The CPP-B rate will change annually, and will therefore be much more volatile than ComEd's currently frozen bundled rates. Even if the CPP rate is extended to 1-3 MW customers, it is reasonable to conclude that 1-3 MW customers will seek out multi-year contracts with competitive electricity suppliers to avoid annual changes in electricity prices.

(BOMA Corr. Ex. 4.0, pg. 17, ll. 376-383).

The record in this case clearly establishes that making the CPP-B auction product available to the 1-3 MW customer class will not affect the development of the competitive market. Therefore, the Commission should order that the CPP-B auction product be made available to the 1-3 MW customer class if an auction process is approved by the Commission. With respect to this issue, BOMA respectfully requests that the Commission adopt BOMA's proposed alternative language to the Proposed Order's Commission Conclusion to Section V.I.1. set forth on pages 7 to 8 of BOMA's Exceptions.

**EXCEPTION 5: The Proposed Order's Conclusion That The 400 kW - 1 MW Customer Class Also Should Be Offered The CPP-A Auction Product Is Likewise Erroneous**

ComEd's original proposal in this proceeding was to make the CPP-B auction product available to customers with peak demands of 400 kilowatts ("kW") to 1 MW. (ComEd 7.0, pg. 9, ll. 195-202; pp. 42-43, ll. 958-972). However, ComEd changed its position in surrebuttal testimony, contending that this class also should be limited to the CPP-A auction product. (ComEd Ex. 18.0, pg. 25, ll. 558-561). ComEd's new proposal and the Proposed Order's conclusion that it should be implemented (Proposed Order, pg. 119) is detrimental to the 400 kW - 1 MW customer class for the same reasons it is detrimental to the 1-3 MW customer class. Therefore, the Commission should conclude that the 400 kW - 1 MW customer class should be offered the CPP-B auction product and adopt BOMA's proposed alternative language to the Proposed Order's Commission Conclusion to Section V.I.2. set forth on page 8 of BOMA's Exceptions.

**EXCEPTION 6: The Proposed Order's Conclusion That A 40 Day Enrollment Window Is Sufficient For Under 3 MW Consumers Is Flawed**

The Proposed Order concludes that a 40 day enrollment window is sufficient for all nonresidential consumers with less than 3 MW of peak electricity demand. (Proposed Order, pg. 176). BOMA originally proposed a 75 day enrollment window in its direct testimony. (BOMA Corr. Ex. 2.0, pg. 25, ll. 528-530). For purposes of compromise, however, BOMA now supports the joint proposal by ComEd and the Coalition of Energy Suppliers of a 50 day enrollment window for the first auction and a 45 day window for all subsequent auctions. (ComEd Reply Br., pp. 132-133; CES Reply Br., pg. 29). This compromise is fair and reasonable.

The Proposed Order's provision of a 40 day enrollment window simply will not allow enough time for customers to make an informed decision on electricity supply. As BOMA witnesses Messrs. Brookover and Childress testified:

> Purchasing electricity is substantially more complicated than many other business purchasing decisions. Electricity is a complex product with a number of shifting regulatory, technical and economic issues that must be understood. Without sufficient time, many customers may make a faulty supply decision or no decision at all.

(BOMA Corr. Ex. 4.0, pg. 18, ll. 401-405).

BOMA agrees with the Proposed Order's statement that the challenge in determining an enrollment window is to strike the "right balance" between providing customers time to make decisions and avoiding the higher premium that would result if suppliers were forced to hold out fixed price call options for longer periods. (Proposed Order, pg. 175). In light of the massive changes being made to ComEd's tariffs, a 40 day enrollment window does not strike that "right balance" to which the Proposed Order refers because it simply does not give consumers enough time to make an informed decision.

BOMA takes no exception to the Proposed Order's determination that a 30 day enrollment window is appropriate for over 3 MW consumers. (Proposed Order, pg. 176). The 30 day enrollment window was endorsed by the Illinois Industrial Electricity Consumers ("IIEC"), which is composed of over 3 MW consumers. (IIEC In. Br., pg. 64). On the other hand, BOMA represents many consumers with less than 3 MW of peak demand who would be adversely affected by a 40 day enrollment window. The

Commission should therefore take special note of BOMA's recommendation concerning the needs of under 3 MW customers, and conclude that for under 3 MW consumers a 50 day enrollment window is appropriate for the first auction and a 45 day window should be used for all subsequent auctions.

Based on the foregoing discussion, BOMA respectfully requests that the Commission adopt BOMA's proposed alternative language to the Proposed Order's Commission Conclusion to Section VII.A.5. of the Proposed Order set forth on pages 8 to 9 of BOMA's Exceptions.

**EXCEPTION 7: To Be Consistent With The Exceptions Taken By BOMA The Proposed Order's Findings And Ordering Paragraphs Must Be Revised**

In order to conform the Findings and Ordering Paragraphs of the Proposed Order to the recommended changes to the Proposed Order's Commission Conclusions discussed above and set forth in BOMA's Exceptions, BOMA respectfully requests that the Commission adopt BOMA's proposed alternative language for the Commission Findings and Ordering Paragraphs in Section X of the Proposed Order set forth on pages 9 to 13 of BOMA's Exceptions.

## CONCLUSION

WHEREFORE, for the above-stated reasons, BOMA respectfully requests that the Commission adopt a Final Order in this proceeding which modifies the Administrative Law Judge's Proposed Order in the manner requested in this Brief on Exceptions by adopting the alternative language set forth in BOMA's Exceptions being filed concurrently herewith.

Respectfully submitted,

**BUILDING OWNERS AND MANAGERS ASSOCIATION OF CHICAGO**

By: /s/ Patrick N. Giordano___

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